

1996

Steve Scott v. Linda Majors : Reply Brief

Utah Court of Appeals

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Mary Ann Hansen; Counsel for Appellee.

Joseph E. Tesch; Dwayne A. Vance; Tesch, Thompson & Fay; Counsel for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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960536-CA

IN THE UTAH COURT OF APPEALS

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| STEVE SCOTT, | : | |
| | : | |
| Plaintiff/Appellee, | : | Court of Appeals No. 960536-CA |
| | : | |
| vs. | : | (formerly Supreme Court |
| | : | No. 960110) |
| | : | |
| LINDA MAJORS, | : | |
| | : | |
| Defendant/Appellant. | : | Priority No. 15 |
| | : | |

REPLY BRIEF OF THE APPELLANT

Appeal from the
Third Judicial District Court, Summit County
Honorable Pat B. Brian, Presiding

Mary Ann Hansen (5200)
60 East 100 South, Suite 101
P.O. Box 1624
Provo, Utah 84606
Telephone: (801) 373-4646

Counsel for Plaintiff/Appellee

Joseph E. Tesch (3219)
Dwayne A. Vance (7109)
TESCH, THOMPSON & FAY, L.C.
P.O. Box 3390
314 Main Street, Suite 201
Park City, Utah 84060-3390
Telephone: (801) 649-0077

Counsel for Defendant/Appellant

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Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

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TESCH, THOMPSON & FAY, L.C.
P.O. Box 3390
314 Main Street, Suite 201
Park City, Utah 84060-3390
Telephone: (801) 649-0077

Counsel for Defendant/Appellant

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ARGUMENT

I. Determinations of Disputed Material Issues of Fact are Improper in a Summary Judgment Proceeding, So Appellant is Not Required to Marshal the Evidence in Support of the Disputed Improper Findings of Fact.

It is important to note that this case was disposed of by the trial court in a summary judgment proceeding. "On a motion for summary judgment, a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist." Draper City v. Estate of Fannie Bernardo, 888 P.2d 1097, 1100 (Utah 1995). "[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. . . . 'Summary judgment procedure is generally considered a drastic remedy,' and is appropriate only when the facts are clear and undisputed." Id. at 1101 (quoting Timm v. Dewsnap, 851 P.2d 1178, 1181 (Utah 1993)).

In Draper City, the Utah Supreme Court reversed a trial court's grant of summary judgment because there were conflicting sworn statements that created issues of material fact that had to be resolved at trial. Draper City, 888 P.2d at 1101. Similarly, the Affidavit of Linda Majors herein creates issues of material fact regarding the representations made to her by Mr. Knapp and the circumstances surrounding her execution of the subject purchase agreement.

It is entirely improper for a trial court to resolve disputed issues of material fact in a summary judgment proceeding. Therefore, in order for an appellant to challenge

such an improper resolution of factual issues on appeal, it is not necessary for the appellant to marshal all of the evidence in support of a trial court's improper findings of fact.

Plaintiff misstates the law on this point. Plaintiff's argument regarding the marshaling of evidence applies only when findings of fact have been made by a judge or a jury after a trial has been conducted. Both of the cases cited by Plaintiff on this point address findings of fact made after trial. See Saunders v. Sharp, 806 P.2d 198 (Utah 1991); Online Corp. v. Granite Mill, 849 P.2d 602 (Utah Ct. App. 1993).

II. Material Issues of Fact Preclude the Grant of Summary Judgment Herein.

In summary judgment proceedings, "[d]oubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment", Defendant herein. Mountain States Telephone & Telegraph Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984).

"Litigants must be able to present their cases fully to the court before judgment can be rendered against them The trial court must not weigh evidence or assess credibility." Id. at 1261. "[S]ummary judgment may be inappropriate even if the defendant fails to properly respond to the motion." TS 1 Partnership v. Allred, 877 P.2d 156, 159 (Utah Ct. App. 1994).

In Mountain States Telephone, the Utah Supreme Court reversed a trial court's grant of summary judgment even though no affidavits were filed in opposition thereto. The Utah Supreme Court explained that the content of the findings of fact made by

the trial judge evidenced the existence of material issues of fact precluding the grant of summary judgment. Mountain States Telephone, 681 P.2d at 1261.

Similarly, the contents of the findings of fact (both oral and written) made herein by Judge Brian evidence the existence of material issues of fact precluding summary judgment. Examples of Judge Brian's improper resolution of material factual issues were given in Appellant's Brief at pp. 10-12. Additionally, unlike Mountain States Telephone, an opposing affidavit was actually filed which specifically created material issues of fact regarding the fraudulent representations made to Defendant to induce her to execute the purchase agreement.

When viewing the facts in a light most favorable to Defendant, reasonable minds could differ as to whether Defendant was fraudulently induced to execute the purchase agreement. Reasonable minds could also differ as to whether all of the necessary elements of equitable estoppel are present. Therefore, the grant of summary judgment ordering specific performance of the purchase contract was improper. See, e.g., Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc., 889 P.2d 445, 449-54 (Utah Ct. App. 1994) (summary judgment properly denied because reasonable minds could differ based on evidence in the record).

A. Order of specific performance of purchase agreement is improper on summary judgment.

The purchase agreement itself is not enforceable by Plaintiff if Defendant's execution thereof was obtained by fraud.

See, e.g., Union Bank v. Swenson, 707 P.2d 663, 665-67 (Utah 1985). Contrary to Plaintiff's assertion, Union Bank is directly on point on this issue, and is controlling authority herein. The facts and issues in both Union Bank and the instant case are identical--a party is attempting to use a summary judgment proceeding to enforce a written contract and to exclude all evidence of fraud in the inducement regarding the execution of the written contract.

The trial court's factual finding that Defendant is merely trying to avoid the purchase agreement due to "cold feet" [R. at 159] completely ignores Defendant's right to elect to rescind the purchase agreement or to affirm it and recover damages. See, e.g., Perkins v. Coombs, 769 P.2d 269, 271 (Utah Ct. App. 1988).

Fraud in the inducement was specifically raised by Defendant as an affirmative defense in her answer, and was also argued in detail in opposition to Plaintiff's motion for summary judgment [R. at 154-60]. Defendant also brought a counterclaim seeking to quiet title, asserting misrepresentation and fraud (specifically electing to rescind), and for slander of title. Defendant's counterclaim was not specifically referenced in Plaintiff's motion for summary judgment, and the hearing thereon only addressed the fraud in the inducement argument in general. Nevertheless, the trial court's grant of summary judgment implicitly and necessarily constituted an adverse ruling on all of the causes of action in Defendant's counterclaim because the grant of summary judgment necessarily precludes the grant of any

relief on Defendant's counterclaim. See Timm v. Dewsnap, 851 P.2d 1178, 1181-82 (Utah 1993).

B. Summary judgment is also improper based on Plaintiff's estoppel theory.

The factual basis necessary for establishing virtually every element of equitable estoppel is disputed herein, thereby precluding summary judgment. It is necessary for the trier of fact to make findings of fact regarding each and every element before judgment can be rendered on Plaintiff's equitable estoppel claim.

1. no inconsistent statement, act, etc.

There was no "statement, admission, act, or failure to act by [Defendant] inconsistent with a claim later asserted." Travelers Ins. Co. v. Kearl, 896 P.2d 644, 647 (Utah Ct. App. 1995). Plaintiff alleges that Defendant's communications with Park City Title January 3-5, 1996 indicated an intent to close, which is supposedly inconsistent with Defendant's later election to rescind. However, Defendant's actions have always been consistent with her legal right to elect at any time to either affirm the purchase agreement and recover damages or to rescind the purchase agreement. See Perkins, 769 P.2d at 271.

As set forth in the Affidavit of Linda Majors, ¶¶ 19-22, at p. 4 [R. at 134], when Defendant did not receive the purchase price in cash within forty-eight hours as agreed, she was forced to make other financial arrangements, she was no longer motivated to sell the subject condominium, and upon advice of counsel she

ultimately exercised her legal right to rescind the fraudulent transaction.

Additionally, Defendant's courtesy in allowing Plaintiff to stay in the subject condominium for one night in no way binds Defendant as a matter of law to sell the subject condominium to Plaintiff. Mr. Knapp telephoned Defendant and explained that he was in Park City and could not find a place to stay. As Defendant's condominium was not being used that night, she graciously gave her consent for him to stay there overnight. It turns out that Plaintiff stayed nearly a week in Defendant's condominium, free of charge, without her knowledge or consent.

2. no reasonable reliance

Plaintiff did not take any action whatsoever in reasonable reliance upon the alleged inconsistent conduct of Defendant. See Travelers, 896 P.2d at 647. The only action allegedly taken by Plaintiff is his travel to Utah and tender of timely performance pursuant to the terms of the purchase agreement. However, Plaintiff admits that he travelled to Utah and tendered timely performance on or before January 3, 1996. See Brief of Appellee, IV.C.1 & 3, at p. 4. Plaintiff further admits that the alleged inconsistent conduct of Defendant did not occur until January 4-5, 1996. See Brief of Appellee, IV.C.5-7, at pp. 5-6. Furthermore, it is apparent from the course of action taken by Plaintiff thus far that Plaintiff would have attempted to close on the purchase of the subject condominium even if Defendant had refused to let him stay in the subject condominium at that time.

Accordingly, Plaintiff did not take any action in reasonable reliance upon the alleged inconsistent conduct of Defendant.

3. no injury

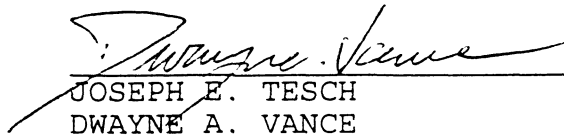
Plaintiff has not established that he would be injured as a result of Defendant's alleged inconsistent conduct. See Travelers, 896 P.2d at 647. The injury Plaintiff claims to have suffered is actually the result of the fraudulent conduct of Mr. Knapp in inducing Defendant to execute the subject purchase agreement. Plaintiff is not entitled to compel specific performance of the subject purchase agreement and Plaintiff's injury is not properly attributable to Defendant's exercise of her legal right to rescind a fraudulent transaction.

CONCLUSION

There are numerous issues of material fact that preclude the grant of summary judgment in favor of Plaintiff in this matter. The trial court improperly resolved these factual disputes in a summary judgment proceeding and also improperly refused to even consider evidence of fraud in the inducement regarding Defendant's execution of the subject purchase agreement.

Similar to the result in Union Bank, Defendant respectfully requests this Court to reverse the trial court's grant of summary judgment, and to remand this case for trial.

RESPECTFULLY submitted this 14th day of November, 1996.



JOSEPH E. TESCH
DWAYNE A. VANCE
Counsel for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 1996 I caused a copy of the foregoing Reply Brief of the Appellant to be mailed, postage prepaid, to Mary Ann Hansen, counsel for Plaintiff/Appellee herein, at the following address:

Mary Ann Hansen
60 East 100 South, Suite 101
P.O. Box 1624
Provo, Utah 84606